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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CLARA B. WATSON, *Petitioner,*

v.

FORT WORTH BANK & TRUST, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Reply Brief for the Petitioner

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ARGUMENTS

I. Contrary to the Contention in Points I and IV of Respondent's Brief, the Facial Neutrality Requirement of *Griggs vs. Duke Power Company* Does Not Elevate Form Over Substance by Restricting Disparate Impact Proof to Only "Objective" Practices.

The Respondent Fort Worth Bank & Trust's system of hiring and assigning employees to positions within the Bank was based solely on the subjective evaluations of its supervisors, who were given no standards either in writing or orally upon which to base their determinations.[1] (J.A. 161-81). The Bank's system for setting compensation was based on yearly evaluations prepared on the anniversary of each employee's date of hire and, though including written standards supposedly professionally developed, was nevertheless based on the subjective evaluation of the Bank's supervisors. (J.A. 52-62, 125-29, 194-95). The same supervisors who determined assignments prepared the yearly evaluations used to compute compensation, and upper management routinely approved these evaluations. (J.A. 58, 66-75, 125-29).

[1]Respondent and its amici struggled to carve up, and confine their argument to only one indistinguishable piece of the strikingly uniform practice by which the Bank – whether through hiring, promotion, transfer, or demotion – fills its vacant positions. The record in this case reveals the striking uniformity of the practice: "The evidence at trial demonstrated that a limited group of white department supervisors made all hiring and promotion decisions, as well as employee evaluations used to compute compensation, and that upper management routinely approved those decisions." *Watson vs. Fort Worth Bank & Trust*, 798 F.2d 791, 796 (5th Cir. 1986), and accordingly, the question this Court has chosen to review is whether "the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps [is] subject to the test of *Griggs vs. Duke Power Company*, 401 U.S. 424 (1971)."

The Bank never attempted to validate its assignment system. Claiming that its salary evaluations were "obtained from an outside consultant," the Bank never provided the name of the consultant or any evidence of validity of the standards applied. (R. II 46, 80). The Bank provided no statistical expert to rebut the overwhelming evidence of its personnel system's disparate impact.[2]

The Bank denied that it had any policy, overt or covert, that separately limited or classified black applicants and employees, yet claims its system should not be analyzed by disparate impact analysis because this Court's decisions restrict disparate impact to "objective" selection procedures. The Bank uses subjective employment selection procedures and claims subjective procedures are by definition, intentional and for that reason lack facial neutrality. This Court in *Griggs vs. Duke Power*

[2]The Respondent unfairly characterizes the testimony concerning the strength of Petitioner's statistical case. Providing no statistician of its own, the Respondent complained that Dr. Tom Marshall, Petitioner's statistician, had taken no account of the qualification of applicants in his statistical study. The Respondent's own vice-president in charge of personnel, Gary Shipp, however, confessed that he had in fact destroyed the records of these qualifications when he routinely destroyed the Bank's employment applications and continued to destroy them during the course of this litigation, leaving no records of employment qualifications to compare. (R.II 45, 46). At the class certification hearing, Mr. Shipp had testified that he could perceive no difference in the qualifications of blacks and whites who applied for employment, but he changed his testimony somewhat at trial and then claimed, strictly from memory, that whites overall had somewhat more experience. He admitted that this was an unreliable estimate. (J.A. 345-46, R.II 43, 45-50, 230-31).

The Respondent criticizes the failure of the Petitioner's statistical study to take into account the frequency of employees' expressions of interest in promotion, but this too was plainly the result of the Respondent's own actions. Vice-President Shipp testified that during the discovery stage of the litigation, he had advised the Petitioner's counsel that the Bank's sporadic recordkeeping of employees' expressions of interest in promotion was

Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) held that under Title VII ". . . practices, procedures, or tests neutral on their face, *and even neutral in terms of intent* (emphasis added), cannot be maintained . . ." if the practices have a disparate impact on minorities or women. 401 U.S. at 429. The clause "and even neutral in terms of intent" demonstrates that the Court considered practices "neutral on their face" to include some intentional practices. The sentence makes plain that the term facially neutral is not the same as unintentional but includes employment practices some of which intend to discriminate and some of which do not.

Artificial attempts to define facial neutrality by differentiating between objective and subjective employment practices are simply not justified by this Court's definition of disparate impact. In footnote 15 of this Court's Opinion in *Teamsters vs. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), disparate impact is defined as follows:

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unreliable and incomplete. (R.III 339). The information was thus not available to examine statistically.

The Respondent's claim that the Petitioner's expert "based all of his analysis upon the dubious assumption that there were always job openings when black applicants sought employment at the Bank," is misleading on two accounts. In a pre-trial deposition, Vice-President Shipp's testimony was that the Bank hired from available applications and that applications were kept on file for a six-month period. (Shipp depo. 10, 26, R.II 45-67). For the first time at trial, Mr. Shipp claimed that he only considered two weeks' worth of applications. (R.II 57-66). Nevertheless, at trial, the Petitioner's expert analyzed this position. The result was a black hire rate of eight percent (8%) and a non-black hire rate of twenty-eight percent (28%), once again demonstrating a statistically significant disparate impact. (J.A. 85-88, 280). The Petitioner also showed that the two-week cut-off testimony was obviously erroneous since Mr. Shipp's own secretary, as well as other employees, had been hired after applying well in advance of the two-week cut-off. (R.II 64-67).

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. [Citation omitted] Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

431 U.S. at 335.

That the facially neutral practices are not defined by intent or lack of intent is obvious from the Court's comment in *Teamsters*, footnote 15, "Either theory [disparate treatment or disparate impact] may, of course, be applied to a particular set of facts." 431 U.S. at 335.

This Court has defined policies not facially neutral, as being facially or overtly discriminatory. "The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." *Griggs*, 401 U.S. at 431. A facially or overtly discriminatory policy is one that admits the discrimination. In *Dothard vs. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), the employer overtly discriminated against women as prison guards. In *Diaz vs. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), the employer overtly discriminated against men as flight attendants. In *City of Los Angeles vs. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), this Court characterized an overtly discriminatory pension fund. ("On its face, this plan discriminates on the basis of sex. . . ." 435 U.S. at 715). A policy which is overtly discriminatory and thus admits discrimination, requires the

same defense – that the policy in question is necessary to the safe and efficient operation of the business – as one that is facially neutral but with a disparate impact.

Clara Watson satisfied the requirement of facial neutrality in her challenge to the Bank's employment practices. The Bank's system of allowing its supervisors unfettered discretion in making subjective evaluations that determine the hiring, assignment and compensation of its employees is not overtly discriminatory. The Bank had no explicit or stated policy of classifying blacks differently than whites. Thus, the Bank's system is facially neutral and amenable to disparate impact analysis.

Finally, Respondent argues that subjective practices are individualized and that Petitioner "did not identify any aspect of Respondent's employment process suitable for testing under the *Griggs* model." Brief for Respondent at 34. Subjective judgments are frequently made on the basis of membership in groups and are not "individualized" at all. Judgments based on graduation from a particular school, geographic background, as well as gender and race, may often form the basis for subjective evaluations of individuals. Disparate impact analysis addresses facially neutral practices which adversely affect a group. Clara Watson's burden was to show the adverse effect of the Bank's practices on black employees. This she did. Thus, by inference she was a victim of those practices. This distinction was aptly addressed by Justice Powell's dissent in *Connecticut vs. Teal*:

> It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct methods of proof. In one set of

> cases – those involving direct proof of discriminatory intent – the Plaintiff seeks to establish direct, intentional discrimination against him. In that type of case, the individual is at the forefront throughout the entire presentation of evidence. In disparate-impact cases, by contrast, the Plaintiff seeks to carry his burden of proof by way of *inference* [emphasis by the Court] – by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of the disproportionately excluded group, was himself a victim of that process' "'built-in headwinds.'" *Griggs*, *supra* [citation omitted]. But this method of proof – which actually defines disparate-impact theory under Title VII – invites the Plaintiff to prove discrimination by reference to the group rather than to the allegedly affected individual.

457 U.S. at 458.[3]

Plainly, the Petitioner is entitled to have her proof tested by disparate impact analysis.

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[3]The often cited footnote 7 in *Furnco Construction Corp. vs. Waters*, 438 U.S. 567, 575 (1978) –

> This case did not involve employment tests, which we dealt with in *Griggs vs. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and in *Albemarle Paper Company vs. Moody*, 422 U.S. 405, 412-413, 95 S.Ct. 2362, 35 L.Ed.2d 280 (1975), or particularized requirements such as the height and weight specifications considered in *Dothard vs. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), *and it was not a "pattern or practice" case* like *Teamsters vs. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) [emphasis added]

– plainly distinguished *Furnco*, not only from earlier cases that had involved standardized tests or particularized requirements, but also from other cases involving group-wide discriminatory patterns.

II. This Court Clearly Held in *Connecticut vs. Teal* That the Legislative History of the 1972 Amendments to Title VII Recognized and Endorsed Application of the Disparate Impact Theory to Employment Systems with Discriminatory Effects.

The Respondent, together with the Solicitor General, claims that the legislative history of the 1972 Amendments to Title VII is entitled to little if any weight, because Congress did not "reenact" the entire statute, and because the Hawkins Bill, H.R. 1746, about which much of the legislative history was written, was not actually adopted, in lieu of a similar substitute bill. But these claims were put to rest conclusively by this Court in *Connecticut vs. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), where the Court plainly held that the 1972 Amendments, which extended the substantive protections of Title VII to employees of state and municipal governments, imprinted upon the substantive protections the 1972 legislative history which had approved the prior judicial establishment and applications of the disparate impact theory of discrimination. The Court held:

> The legislative history of the 1972 amendments to Title VII, 86 Stat 103-113, is relevant to this case because those amendments extended the protection of the Act to respondents here by deleting exemptions for state and municipal employers. *See* 86 Stat 103. That history demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*. Both the House and Senate Reports cited *Griggs* with approval, the Senate Report noting:
>
> > Employment discrimination as viewed today is a . . . complex and pervasive phenomenon.

> Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. S. Rep. No. 92-415, p. 5 (1971).

See also H.R. Rep. No. 92-238, p. 8 (1971). In addition, the section-by-section analyses of the 1972 amendments submitted to both houses explicitly stated that in any area not addressed by the amendments, present case law – which as Congress had already recognized included our then recent decision in *Griggs* – was intended to continue to govern. 118 Cong. Rec. 7166, 7564. (1972).

457 U.S. at 447 n.8.

In the course of applying to public employees the substantive protections of Title VII, the Supreme Court drew upon the 1972 legislative history and prior case law, and thus defined the substantive protections and the disparate impact theory in particular, in terms of systems and effects.[4] The same legislative history, which this Court therefore determined had endorsed the disparate impact approach as one of Title VII's substantive protections, made no distinction at all between the objective and the subjective – and in fact, contained clear references to certain subjective practices – among the discrim-

[4]Respondent cites footnote 39 of this Court's opinion in *Teamsters*, to support the Bank's claim that the 1972 legislative history is not relevant to an understanding of Title VII. In that footnote, Justice Stewart found no fault with the application of the legislative history of the 1972 Amendments to Title VII that the majority had made in *Franks vs. Bowman Transportation Co.*, 424 U.S. 747, 759-64 (1976). *Franks* held that the legislative history of the 1972 Amendments regarding the application of present case law to Title VII expressed Congressional intent to adopt disparate impact analysis as determined and developed by the courts at that time. This Court has re-affirmed the point in *Connecticut vs. Teal*. *See* text above.

inatory "systems" and "effects" the statute was designed to eliminate.[5]

III. The Guidelines of the United States Equal Employment Opportunity Commission Which Pertain to Employment Selection Procedures Have Been Construed to Apply and Have Applied Disparate Impact Analysis to Subjective Selection Procedures, Contrary to the Statements in Sections III, IV and V of Respondent's Brief.

A. *Section 6B of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. sec. 1607.6B, Addressing the Question of Validation of Selection Practices Which Exhibit Disparate Impact, Makes No Exception Based on the Objectivity or Subjectivity of the Practice.*

Both the Respondent and the Solicitor General claim Section 6B(1) of the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 (1978) (codified at 29 C.F.R. sec. 1607.6B(1)) provides an exception for subjective procedures, eliminating the need to demonstrate the business necessity for the procedures in the face of proven disparate impact. Both claim the Section subjects such procedures to no more than a test for disparate treatment.

Section 6B sets out what is required of the user of a selection procedure with disparate impact when the user "cannot or need not utilize the validation techniques contemplated by these guidelines." 29 C.F.R. sec. 1607.6B.

[5] *See* Brief for Petitioner on the Merits at 26-29, discussing the pre-1972 case law cited in the legislative history, which had applied disparate impact analysis to subjective employment practices.

What is required is that the employer "utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact" as more fully explained in the next two subsections. *Id.* The Respondent and Solicitor General cite only the next subsection, for their claimed exemption for subjective procedures. It reads as follows:

> (1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, *or otherwise justify continued use of the procedure in accord with Federal law.*

29 C.F.R. sec. 1607.6B(1) (emphasis added).

What the Respondent and the Solicitor General fail to point out, however, is that the Guidelines set up *exactly the same requirements* where an employer is unable to validate *objective* procedures. The very next subsection covers objective procedures and reads as follows:

> (2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact *or otherwise justify continued use of the procedure in accord with Federal law.*

29 C.F.R. sec. 1607.6B(2) (emphasis added).

Thus, the enforcing administrative agency has carved out no special exception for subjective procedures, but rather has treated both objective and subjective procedures the same when more technical validation is not possible. The Respondent and Solicitor General disregard this parallelism and attempt to rework this section of the Guidelines into a requirement of disparate treatment analysis permitted only for subjective employment selection procedures. The Respondent and amicus would have the Court interpret the Guidelines' requirement that the procedure be justified in "accord[ance] with federal law" as requiring an employer to articulate a legitimate nondiscriminatory reason for the employer's maintenance of the *entire employment selection procedure shown to have disparate impact*. Presumably, the employer would have the burden of proof in this regard. The scheme has no support in any prior case law and is certainly not supported by this Court's decision in *Griggs vs. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). The Solicitor General's suggestion that the justification for disparate impact required by Section 6B may be satisfied ". . . by showing that the selection procedure is reasonably related to the requirements of the job or other business needs and has been applied in a nonpretextual fashion, *as the employer would do in any disparate treatment case* [emphasis added], . . ."[6] does concede, in spite of the awkward allusion to disparate treatment, that disparate treatment analysis is *not* appropriate where subjective employment procedures have a group-wide disparate effect, since disparate treatment analysis requires articulation of a legit-

[6]Brief for the United States as Amicus Curiae supporting Respondent at 27.

imate business reason for only a *particular* employment decision, *not* the *selection process itself*. But *Griggs* required proof of business necessity of the employer to justify any practice having a proven disparate impact. There is neither authority nor logic for changing that burden.

Despite the Solicitor General's attempts to claim otherwise in his brief, the Equal Employment Opportunity Commission has clearly and consistently insisted that where technical validation is not possible, Section 6B still requires proof of business *necessity*. Effective May 2, 1980, the EEOC promulgated a series of questions and answers designed to "clarify and interpret but not to modify" the Uniform Guidelines on Employee Selection Procedures that had been adopted August 25, 1978. Question 36 of the clarification and interpretation clearly addressed the present issue:

> The following questions and answers (36-81) assume that a selection procedure has an adverse impact and is part of a selection process that has an adverse impact.
>
> 36. Q. How can users justify continued use of a procedure on a basis other than validity?
>
> A. Normally, the method of justifying selection procedures with an adverse impact and the method to which the Guidelines are primarily addressed, is validation. The method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. *See* Section 6B. In *Griggs vs. Duke Power Co.*, 401 U.S. 424, the Supreme Court indicated that the burden on the user was a heavy one, but that the selection procedure could be used if there was a "business neces-

> sity" for its continued use; *therefore, the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business to justify continued use of a selection procedure.*

U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures: Interpretation and Clarification, 44 Fed. Reg. 11996 (1979) (emphasis added).

Section 6B offers no solace to Respondent in its attempt to find an exception in the wording of the Guidelines. The Guidelines and the EEOC's interpretation of them make no distinction between subjective and objective procedures, either in the general applicability of disparate impact analysis to the procedures or in the specific requirement of business necessity as the only sufficient justification for the maintenance of employment selection procedures that regularly and adversely affect members of protected groups.

B. *The Respondent Has Produced No Evidence in the Case at Bar even Attempting to Show Either the High Cost or Impossibility of Validating the Bank's Employment Practices, and No Evidence that Either the Cost or the Feasibility of Validation is Generally and Substantially Influenced by the Subjectivity or Objectivity of the Practices.*

The Respondent has produced no evidence in this record to support its claim that the validation of subjective procedures is more burdensome, difficult or expensive than the validation of objective procedures. Nor has it produced any evidence that its particular employment

procedures or that any other subjective procedures are impossible to validate.

The evaluation and balancing of the competing cost considerations of alternative policies are best left to the Congress and the administrative agencies charged with the enforcement of Title VII. Certainly, the record before this Court is devoid of any evidence as to the cost or impossibility of validation procedures that could justify striking new balances and discarding existing policies.

The authorities cited in the briefs of the Respondent and the Solicitor General are hardly sufficient bases for making a judgment of this magnitude. The cost estimates presented by the Solicitor General can arguably apply to the validation of either subjective or objective employment procedures, and thus, are not responsive to the issue before the Court. One authority, an article, Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame Law. 633 (1979) cites no basis whatsoever for its bare assertion that a validation could cost from twenty to one hundred thousand dollars.[7] The reasonableness of the costs asserted and of the elaborate validation techniques assumed in the Gwartney article, have been called into question by others,[8] and the article and the Solicitor General altogether ignore the payoff of validation studies:

[7]Another study on this point cited by the Solicitor General, A. Outerbridge, Personnel Res. and Dev. Ctr., OPM, *TM-79-18, A Survey of Test Validation Study Costs*, (Aug. 1979), is not in general circulation, and perhaps unpublished.

[8]Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35 (1985).

> While a validation study has costs associated with it, it is possible to calculate the payoff available to the organization from the use of valid selection procedures; in most cases, this payoff will be appreciable. Numerous reviews have found criterion-validity studies to be highly cost effective [citing authorities].

Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35, 42 (1985).

The Respondent's and its amici's cries that validation of subjective employment procedures is impossible are also without merit. This Court has long recognized the professional standards for validation promulgated by the American Psychological Association. *See, e.g., Albemarle Paper Co. vs. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The amicus brief of the Association on behalf of this Petitioner clearly attests to the practicality of applying its professional standards for validation to subjective employment selection devices. In response, the Solicitor General relies upon Professor Edwin Ghiselli[9] and others to broadly proclaim:

> Accordingly, commentators in the legal, industrial psychology, and personnel administration professions have almost uniformly stated that subjective selection processes do not have the "technical reliability" [footnoting to Ghiselli] that is a necessary precondition of validation or other formal substantiating method.

Brief for the United States as Amicus Curiae supporting Respondent at 20-21.

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[9]E. Ghiselli, *Theory of Psychological Measurement* 208 (1964).

Two years after his book, cited by the Solicitor General, had been published, Professor Ghiselli published the results of his successful validation of a subjective personnel interview process, and found:

> In conclusion, it can be said that the ordinary personnel interview is not necessarily invariably invalid, but its validity may be at least equal to, if not greater than, the validity of tests.

Ghiselli, *The Validity of a Personnel Interview*, 19 Personnel Psychology 389, 394 (1966).

Numerous studies belie the claim that subjective criteria are not amenable to formal validation procedures.[10] Even the amici on behalf of the Respondent, the American Society for Personnel Administration, and the International Personnel Management Association, who agree with Petitioner that the "objective"-"subjective" distinction is irrelevant, have themselves published considerable literature dealing with the application of the EEOC Guidelines to subjective employment practices. The official publication of the American Society for Personnel Administration, Personnel Administrator, and the official publication of the International Personnel Manage-

[10] *See, e.g.*, Brief for the American Psychological Association as Amicus Curiae in support of the Petitioner; Arvey, *Unfair Discrimination in the Employment Interview: Legal and Psychological Aspects*, 86 Psychological Bull. 736 (1979); Arvey & Campion, *The Employment Interview: A Summary and Review of Recent Research*, 35 Personnel Psychology 281 (1982); Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 987-88 (1982) (and see cases cited therein); Kraiger & Ford, *A Meta-Analysis of Ratee Race Effects in Performance Ratings*, 70 J. Applied Psychology 56 (1985); Landy & Farr, *Performance Rating*, 87 Psychological Bull. 72 (1980); and Schmidt, Hunter & Pearlman, *Validity Generalization Results for Tests Used to Predict Job Proficiency and Training Success in Clerical Occupations*, 65 J. Applied Psychology 373 (1980).

ment Association, the Public Personnel Management Journal, have stressed both the necessity and the practicality of complying with the EEOC Guidelines where subjective employment procedures are involved.[11]

Nevertheless, lower courts have not infrequently relieved employers of the need to submit their practices, whether subjective or objective, to formal validation when it is impractical – instead finding the requisite business necessity if only the otherwise unstructured practice is standardized and therefore reliable, *Gillespie vs. State of Wisconsin*, 771 F.2d 1035 (7th Cir. 1985), or if the practice is informally validated by expert testimony or expert public documents, *Davis vs. City of Dallas*, 777 F.2d 205 (5th Cir. 1985), or by generalizable judicial precedents, *Aguilera vs. Cook County Police and Corrections Merit Board*, 760 F.2d 844 (7th Cir. 1985); *Smith vs. Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977); or by a tradition of generations of use, *Zahorik vs. Cornell University*, 729 F.2d 85 (2nd Cir. 1984); or even by the plausibility of the employer's bare argument, *Yuhas vs. Libbey-Owens-Ford Company*, 562 F.2d 496 (7th Cir. 1977). This Court once found the requisite "manifest relationship to the employment in question" when the employer's legitimate objectives were "significantly

[11] *See, e.g.*, Curry, *A Common-Sense Management Approach to Employee Selection and EEO Compliance for the Smaller Employer*, 26 Personnel Admin. 35 (1981); Davey, *Personnel Testing and the Search for Alternatives*, 13 Pub. Personnel Mgmt. J. 361 (1984); Gatewood & Ledvinka, *Selection Interviewing and EEO: Mandate for Objectivity*, 24 Personnel Admin. 51 (1979); Holmes, *What's Ahead for Personnel Professionals in the '80s?*, 25 Personnel Admin. 33 (1980); Sackett, *A Critical Look at Some Common Sense Beliefs about Assessment Centers* 11 Pub. Personnel Mgmt. J. 140 (1982); and Schanie & Holley, *An Interpretive Review of the Federal Uniform Guidelines on Employee Selection Procedures*, 25 Personnel Admin. 44 (1980).

served by – even if they do not require" his use of a racially inequitable practice. *New York City Transit Authority vs. Beazer*, 440 U.S. 568, 587 n.31 (1979). But the strength of proof of business necessity which ought to be required from an employer defending against prima facie evidence of disparate impact, and certainly the costs of proof, are not here at issue; this case involves only a plaintiff employee's right to attempt to prove unlawful discrimination under the disparate impact theory.

C. *Contrary to Respondent's Argument in Section III of its Brief, the Equal Employment Opportunity Commission Has Consistently and Recently Applied Disparate Impact Analysis to Subjective Employee Processes.*

The Respondent argues that the Solicitor General's amicus brief and a single unpublished decision, *Ziman vs. U.S.P.S.*, No. 01842595 (July 23, 1986), support its claim that "a subjective selection process cannot be facially neutral" and thus cannot be subject to the disparate impact doctrine. Brief for Respondent at 32-33. *Ziman vs. U.S.P.S.* is not a published decision of the Equal Employment Opportunity Commission. It is, rather, an appeal from an administrative decision of the United States Postal Service, written by a hearing officer for the Office of Review and Appeals. It makes no mention whatsoever of the EEOC Guidelines, interpretations, or even previous EEOC decisions. It makes no mention of the position publicly taken and strenuously argued by the EEOC just months earlier, in a published decision of the Eighth Circuit.

In *EEOC vs. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986), the EEOC challenged the subjective hiring practices of Rath Packing, using disparate impact analysis. The challenged practices and defensive positions of Rath sounded very much like the practices and positions argued by the Respondent in the case at bar:

> Rath's office manager, Walter McFarland, was responsible for accepting and maintaining applications and selecting applicants for employment. The plant superintendent had the authority to overrule McFarland's choice of applicants but seldom did so. Rath had no written or otherwise established selection guidelines and McFarland was unable to identify what information was deemed significant in evaluating and selecting applicants. . . .
>
> . . . .
>
> Rath next argues that the District Court erred in holding that there was no business necessity for Rath's subjective hiring practices. Rath had no established criteria for selecting employees. . . .
>
> . . . EEOC also argues that Rath failed to establish that the subjective hiring procedures were necessary or essential and that there were no alternative practices with less discriminatory effect.
>
> . . . .
>
> . . . After EEOC established the *disparate impact of the subjective hiring practices*, Rath had the burden of producing evidence of business necessity and the burden of persuasion on that issue.

787 F.2d at 322, 327-28 (emphasis added).

Rath Packing reveals that the EEOC, less than two years ago, vigorously prosecuted a nearly bankrupt employer for its subjective hiring practices, applied the

disparate impact theory of proof, and prevailed. The EEOC and the other enforcing agencies have undertaken no administrative action in an attempt to change in any way their Guidelines or interpretations of the Guidelines. The position they have taken in this lawsuit is foreign to their own Guidelines, their own decisions, and their own recent litigation.

CONCLUSION

The Judgment of the Court of Appeals, upholding the Judgment of the District Court, insofar as it prohibited the Petitioner from having her case analyzed under the disparate impact theory, should be reversed.

Respectfully submitted,

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